

December 2004 *Multnomah Lawyer Ethics Focus*

The New Rules: What's Inside the Box? Part 1—Conflicts

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The proposed new Oregon Rules of Professional Conduct that I discussed in October were approved by the OSB's House of Delegates on October 16 and were adopted by the Oregon Supreme Court on October 26. The new rules become effective on January 1. This column and the next three will examine what's in the new rules in four key areas: conflicts, confidentiality, the "no contact with represented parties" rule and multijurisdictional practice. We'll start this month with conflicts—current, former, personal/business interest and waivers.

Current Client Conflicts

Current multiple client conflicts are now defined in DR 5-105(A), (E) and (F) and have some unique terms such as "actual" and "likely" conflicts that codified, in part, the Supreme Court's decision in *In re Johnson*, 300 Or 52, 707 P2d 573 (1985). In the new rules, the current multiple client conflict rule is RPC 1.7(a)(1). Although the terminology is different, the new rules get to essentially the same place as the old rules in terms of what constitutes a conflict, which are waiveable and which are not. A current multiple client conflict is defined as a situation in which "the representation of one client will be directly adverse to another client." A current client conflict is waiveable under RPC 1.7(b) if it is

unrelated to a matter that the lawyer is handling for the client to be opposed. The definition of nonwaivable conflicts from the old rules (“actual conflicts”) is incorporated into new RPC 1.7(b)(3) and prohibits a lawyer from representing both sides in the same matter—whether litigation or business—even if the clients involved want to consent.

Former Client Conflicts

Former client conflicts are now defined in DR 5-105(C) and (D) and largely reflect the Supreme Court’s decision in *In re Brandsness*, 299 Or 430, 702 P2d 1098 (1985). In the new rules, the former client conflict rule is RPC 1.9(a) and (c). Again, although the terminology is somewhat different, the result should be roughly the same. As in the old rules, there are two kinds of former client conflicts: (1) when the lawyer is representing a new client in a matter “materially adverse” to a former client that is the same or “substantially related” to one the lawyer handled for the former client; and (2) when the lawyer’s new representation would involve using the former client’s confidential information, that the lawyer learned in earlier work, adversely to the former client. Like DR 5-105(D), all former client conflicts under RPC 1.9 are waiveable.

Personal and Business Conflicts

Personal and business interest conflicts are dispersed throughout the current rules—including DR 5-101, DR 5-104, DR 5-107, DR 5-108 and DR 5-110. The new rules largely retain the same concepts but centralize most of them

into RPC 1.7(a)(2), which deals generally with personal interest conflicts, and RPC 1.8, which aggregates most of the specific regulations—such as business transactions with clients and payment of a lawyer’s fee by a third party—in one spot.

Waivers

The present template for conflict waivers is DR 10-101(B), which defines them in terms of “full disclosure” and includes a requirement in most circumstances that waivers be confirmed in writing and include a recommendation to seek independent counsel on whether the waiver should be granted. Again, the new rules retain these concepts, but define them instead in terms of “informed consent” under RPC 1.0(g) as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Both the requirements, that consent be confirmed in writing and include a recommendation to seek independent counsel, are also retained in RPC 1.0(g).

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal

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